No. 214.

Reply Brf. of Cunneen for Apps.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

NO. 214.

THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, *Appellants,*

vs.

JAMES B. LYON.

BRIEF IN REPLY.

JOHN CUNNEEN,
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Buffalo, N. Y.

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Appellants,
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BRIEF IN REPLY.

In view of the patient and considerate hearing which the Court accorded me in this case, I tender a word of explanation and apology for availing myself of the opportunity so kindly extended by the Court at the close of Mr. Becker's argument, to file a reply.

I.

The following allegations in the brief of counsel for the appellee filed herein have no support whatever in the record; they are purely voluntary statements on his part.

The statement on page 3 that "owing to the fact that this assessment was so plainly void because the law was unconstitutional, no serious attempt was ever made to enforce it, and only a small amount was paid upon it."

* * * "In fact the assessment was abandoned soon after it was levied," is contrary to the record, wherein it is alleged (Fol. 35) that when the assessment list under the Act of 1893 became final, it was "delivered to

> "the Supervisor of the Town of Tonawanda,
> "William J. Rogers, who was the predecessor of
> "the defendant Patton, as supervisor of said
> "town; that the said supervisor proceeded to
> "collect said assessments and to apply the same
> "in payment of principal and interest as the
> "same became due, pursuant to the provisions
> "of said bonds, and *did threaten to advertise*
> "*and sell such lands*, so assessed as aforesaid, as
> "should be necessary to raise the moneys neces-
> "sary to pay said bonds, and that the supervi-
> "sor of said town for the time being continued
> "to make collections of the installments of said
> "assessments until on or about the 29th day of
> "May, 1895, when Chapter 816 of the Laws of
> "the State of New York of 1895 was approved
> "by the Governor and became of force, and that
> "thereupon the town board of the Town of
> "Tonawanda proceeded to reassess the moneys
> "necessary to pay said bonds as aforesaid, pur-
> "suant to the direction contained in section 27
> "of the statute last mentioned."
>
> (See also folios 37-38).

Neither has the following statement in counsel's brief any support in the record, viz:

That section 27 was "smuggled into the middle of the act," (of 1895) "by appellant's counsel."

If counsel deemed it important to have it adjudged whether this section was smuggled into the statute or not, he should have presented the subject in his bill; if he did not deem it of sufficient importance to present it by his bill when issue could have been properly taken upon it he should not have made a voluntary statement on the subject in his brief. I object to these outside matters being considered but if they are to be let me say that section 27 was not "smuggled" in. It was deemed necessary because the Act of 1893 contained no provision for the future care of this road and the ordinary methods were not supposed to be adequate, also because errors had been committed in making the first assessment which it was desired to correct.

Again, at page 5 of his brief, he states that the "lots varied greatly in depth, *situation* and value."

The word "situation" is used for the first time in counsel's brief; it will not be found in the record.

The following statement at the foot of page 10 of counsel's brief is not sustained by the record nor by the facts, viz:

> "The appellants have sought and obtained from "the State Legislature, since the decree appealed "from was entered, ample authority to make a "new assessment for the expenses of this im- "provement after 'proper inquiry' and ascer- "tainment of the amount of the special benefits "accruing to the several lots. This new act, "drawn by appellant's counsel, amply safeguards "both the appellant town and the owners of the "property to be assessed.

"Chapter 307 of the Laws of 1900."

And the same matter is made the subject of a separate point of discussion on pages 25 and 26 of appellee's brief.

I do not know that it is important who obtained the legislation of 1900, or who drew the statute, but the facts are otherwise than as stated in counsel's brief. The legislation was sought and obtained by the property owners along the street because it imposes 20 per cent. of the expense of the improvement upon the property generally in the Town of Tonawanda, whereas the former statute required the property fronting on the street to pay all, and authorizes the Comptroller of the State of New York to exchange over one hundred thousand dollars of the bonds issued on account of this improvement, and now owned by the state, for eighty thousand dollars of new bonds to be issued according to the provisions of this new act. The town was willing to stand on the assessment of 1895, and was very much inclined to oppose the act of 1900.

The statute was drawn by counsel for the property owners and submitted to myself, as attorney for the town, for criticism, and I did criticise it as to its form, but the supervisor of the town, Patton, who was then a member of the Assembly of the State of New York, voted against the bill, and it was a serious question with the town board whether they should not make an active resistance to the enactment of this statute; however, they simply acquiesced, allowing the legislature to pass the act in compliance with the request of the pro-

perty owners hoping thereby to secure peace from litigations.

Now this matter is all extraneous of the record. But if any of the matter is to be considered, let me say further, that the validity of the act of 1900 is already in question.

(1), it is claimed that the title is defective under the constitution of the State of New York in that it is a special act, that it has but one subject suggested in its title, whereas, it has various subjects in its body;

(2), that it attempts to give away public moneys by authorizing the exchange of bonds, and, therefore, was not passed by the requisite vote under the constitution of the State of New York;

(3), that the bonds are in the United States Deposit Fund for Schools, and that the act impairs the obligation of a contract in reference to this fund existing between the United States and the State of New York.

If the decision of the Circuit Court in this case is affirmed by this Court we will have litigations for years to come over the validity of the act of 1900 by these property owners who will thus prevent the sale of their lands in satisfaction of the taxes, while they will be enjoying the benefit of the improvement, as they have done in the past in a litigation which will have its culmination in the decree of this Court to be made in this action, and which has been pending since 1896, and which at one time, as appears by the record, had a large number of cases pending at the same time. While if the decision

of the Circuit Court is reversed, and this Court holds that the statute, which directed the apportioning of this expense by the foot front, was constitutional and valid, there will be no further litigation by the property owners, because they will know that if they succeed in having the act of 1900 declared unconstitutional or void or the assessment illegal or void, we will have the assessment under the act of 1895 declared valid by the highest court in the land, and we will be at liberty to proceed under it, a thing which the property owners will never desire, because it will impose 20 per cent more of the expense upon their property than will the act of 1900.

If the town board, as stated in counsel's brief, are willing to accept the act of 1900 as a compromise of the controversies, and in order to avoid the sale of the lands and further troubles and complications in the matter, then the practical result will be that if the judgment of the United States Circuit Court in this case is reversed the town will accept the provisions of the act of 1900, having, as counsel states in his brief, "now engaged in making this re-assessment," (Last line of Point 2, p. 11), and the property owners will acquiesce in the statute because it will be for their interest to do so to avoid the payment of one-fifth of the expense of the improvement, which under the act of 1900 is imposed on the town at large.

Thus a decision reversing the decision of the Circuit Court will lead to peace and tranquility, while a decision affirming the decree of the Circuit Court will precipitate another flood of litigations.

II.

A word as to the case added to my brief during the oral argument.

It appears that Commissioners of Public Works of the District of Columbia improved one of its streets. "After the completion of the work, they made "an assessment of one-third of its cost upon the "property adjoining, *proportioning it to the* "*frontage*." (Middle page 688). Subsequently a suit was brought to have this assessment adjudged void. The bill charged, among other things, "3d, that "assessments according to the frontage of the "street were unauthorized and illegal." (Middle "page 689).

It is said by the Court "Congress may legislate with- "in the District, respecting the people and pro- "perty therein, as may the legislature of any "State over any of its subordinate municipali- "ties." (Middle page 690).

Again, "the question is therefore presented, whether "the legislative assembly was empowered by "the organic law of the District to commit "to the Board of Public Works public improve- "ments, to make appropriations for them, and "to prescribe the manner in which assessments "should be made, or whether Congress itself has "confirmed the assessments of which the plain- "tiffs complain." (Foot page 690).

Again: "It may be that the burden laid upon the pro-

"perty of the complainants is onerous. Special "assessments for special road or street improve- "ments very often are oppressive. But that the "legislative power may authorize them, and "may direct them to be made *in proportion to* "*the frontage*, area, or market value of the ad- "joining property, at its discretion, is, under the "decisions, no longer an open question."

Mattingly vs. District of Columbia, 97 U. S., 687.

III.

Please let me add to my citations to establish that decisions defining the power of the legislature under the constitution and sustaining the method of assessment of the expense of local improvements made by the highest courts of the State of New York, constitute rules of property and adjudications as to what constitutes due process of law within the state, which it would be wrong to disturb in the Federal Courts.

Walker vs, Sauvinet, 92 U. S., 90.

In Conclusion, it is respectfully submitted that the decree appealed from should be reversed with costs to the appellants in this court, and the cause remanded with direction to dismiss the suit with costs in the court below.

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